Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1997

PATRICIA FULTON, Personal Representative of the Estate of JUDITH LUCAS and GROVER LUCAS,

Petitioners,

vs.

RICKY SANDERS, KENNETH HARDIN and PAUL ISAACS.

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

WILLIAM R. FISHER
MONAGHAN, LEAHY, HOCHADEL & LIBBY, LLP
95 Exchange Street
P.O. Box 7046
Portland, ME 04112-7046
(207) 774-3906

MATTHEW J. BAKER
Counsel of Record
COLE, MOORE & BAKER
921 College Street
P.O. Box 10240
Bowling Green, KY 42102-7240
(502) 782-6666

Attorneys for Petitioners

72443 (800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21 Lutz Appellate Services, Inc.

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QUESTIONS PRESENTED

1. Did the Sixth Circuit deviate from *DeShaney v. Winnebago County Department of Social Services* and its progeny when it concluded that a Kentucky State Trooper's detention of a motorist in acute cardiac distress did not result in a special relationship or state-created danger which would give rise to a claim for relief pursuant to 42 U.S.C. § 1983?

2. Did the Sixth Circuit err in concluding that a Kentucky State Trooper's detention and verbal abuse of a motorist in acute cardiac distress did not violate a clearly established substantive due process right which would give rise to a claim for relief pursuant to 42 U.S.C. § 1983?

3. Did the Sixth Circuit err in concluding that a Kentucky State Trooper's detention and verbal abuse of a motorist, who was in acute cardiac distress and en route to a hospital emergency room at the instruction of a physician, did not give rise to a claim upon which relief could be granted under the Fourth Amendment pursuant to 42 U.S.C. § 1983?

LIST OF PARTIES

Pursuant to Rule 14.1(b) of the Supreme Court Rules, the parties to the proceedings below whose judgment is sought to be reviewed are:

Plaintiffs/Petitioners: Patricia Fulton, Personal Representative of the Estate of Judith Lucas and Grover Lucas

Defendants/Respondents: Ricky Sanders, Kenneth Hardin and Paul Isaacs

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APPENDIX

Appendix A — Order Of The United States Court Of Appeals For The Sixth Circuit Filed August 13, 1997 ..... 1a

Appendix B — Memorandum Opinion And Order Of The United States District Court For The Western District Of Kentucky, Bowling Green Division Entered August 9, 1997 ..... 3a

The Petitioners petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above-entitled proceeding on August 13, 1997.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Sixth Circuit is reported at 124 F.3d 197 (6th Cir. 1997). A copy is reproduced as Appendix A. The Memorandum Opinion and Order of the United States District Court for the Western District of Kentucky, Bowling Green Division, is unreported. A copy is reproduced as Appendix B.

STATEMENT OF JURISDICTION

The Petitioners invoke the jurisdiction of this Court under 28 U.S.C. § 1254(1). The dismissal by the United States District Court of the Western District of Kentucky, Bowling Green Division, was entered on August 5, 1996. On August 13, 1997, the Sixth Circuit entered an Order denying the Petitioners' appeal of that dismissal and adopted by reference the Opinion of the District Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions implicated by this lawsuit are the Fourth and Fourteenth Amendments to the United States Constitution, 42 U.S.C. § 1983 and 28 U.S.C. § 1291.

Fourth Amendment:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable

searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, support by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Fourteenth Amendment (Section 1 only):

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983:

Every person who, under color or any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

28 U.S.C. § 1291:

> The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

STATEMENT OF THE CASE

A. Nature of the Case.

The Petitioners commenced this action by a Complaint dated January 17, 1996, pursuant to 42 U.S.C. § 1983 against Kentucky State Trooper Ricky Sanders, Kenneth Hardin and Gene Peters in their individual and official capacities.[1] In essence, the Petitioners alleged that Trooper Sanders violated their Fourth and Fourteenth Amendment rights on June 21, 1995. At that time, Grover Lucas, at the instruction of a doctor, was taking his wife, Judith, to the hospital. Grover was traveling at a high rate of speed because his wife was having a heart attack.

When Trooper Sanders stopped the Lucas vehicle, Grover immediately told him that his wife was having a heart attack. Trooper Sanders was unmoved by this information, and he proceeded to berate and verbally chastise Grover and Judith.

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1. Defendant/Respondent Isaacs was subsequently named as a defendant by way of amended complaint.

His demeanor might charitably be described as abusive, threatening, bullying, obnoxious, demeaning, intimidating, insensitive, rude, and stunningly unprofessional. Judith told Sanders, when asked, that she was "not feeling too well." Sanders then took her pulse and concluded that she appeared "okay." Sanders told Grover that he would call an ambulance, if that is what Grover wanted; however, Sanders threatened to take them both to jail if they exceeded the speed limit on the way to the hospital emergency room. Sanders then *followed* them to the hospital. Judith died a short time later.

B. Course of Proceedings Below.

Prior to the commencement of discovery, the Respondents moved to dismiss the Petitioners' Complaint on February 9, 1996, pursuant to Fed. R. Civ. P. 12(b)(6). The Respondents argued that the Petitioners failed to state a violation of a constitutional right, that there was no special relationship between the Petitioners and Respondents that gave rise to a constitutional duty, that the Petitioners failed to show a violation of a "clearly established right," and that Trooper Sanders was entitled to qualified immunity. The United States District Court for the Western District of Kentucky, Bowling Green Division, granted the Respondents' Motion to Dismiss on August 5, 1996, and the trial court's opinion was adopted *verbatim* by the United States Court of Appeals for the Sixth Circuit.

C. Statement of Facts with Record Citations.

The facts before the District Court were captured by a videotape recorder mounted in the police cruiser assigned to Trooper Sanders. That videotape is contained in the record below under Record Entry number 5, captioned "Notice of Filing." It depicts the following events: On June 21, 1995, Grover was driving his wife, at a high rate of speed, to the Bowling Green Hospital. Trooper Sanders stopped them for speeding. Grover

immediately exited his truck, ran toward Trooper Sanders and told him "she's having a heart attack." Grover's demeanor throughout the entire assault of Trooper Sanders was apologetic and conciliatory.

After being told that Judith was having a heart attack, Trooper Sanders stated, among other things, the following:

> What in the world are you doing buddy? You're out here endangering everybody . . . I'm not going to drive through this traffic like a maniac like you are . . . It [Grover's apology] will do a whole lot of good to the people you kill when you hit them head on . . . You're going to obey the traffic laws because I'm following you . . . I'm going to follow you, and I'll tell you right now, you start breaking these laws, like you are [Grover interrupts and says, "I won't do it sir."] like you have been in the past, you're going to jail.

As the foregoing events unfolded, Judith sat in the pick-up truck.[2] During the Sanders tirade, which lasted for a period of minutes, Sanders asked Judith how she was feeling, felt her pulse, and concluded that her pulse "is okay." No written words can fairly describe the nature of Sanders' utterly reprehensible conduct toward Grover and Judith. The tape, on the other hand, speaks eloquently toward that end. After Sanders threatened to take Grover to jail if he exceeded the speed limit, he followed the Lucas pick-up truck to the hospital. Judith died of heart complications a short time later.

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2. Unbeknownst to Trooper Sanders, not only was Judith Lucas experiencing a heart attack, she was also completely blind.

REASONS FOR GRANTING THE WRIT

I.

THE SIXTH CIRCUIT DEVIATED FROM *DESHANEY* AND ITS PROGENY WHEN IT CONCLUDED THAT A KENTUCKY STATE TROOPER'S DETENTION OF A MOTORIST IN ACUTE CARDIAC DISTRESS DID NOT RESULT IN A SPECIAL RELATIONSHIP OR STATE-CREATED DANGER WHICH WOULD GIVE RISE TO A CLAIM FOR RELIEF PURSUANT TO 42 U.S.C. § 1983.

The Fourteenth Amendment provides that "[n]o state shall . . . deprive any person of life, liberty, or property, without due process of law. . . ." U.S. Const. amend. XIV, § 1. Unlike its procedural counterpart, substantive due process protects citizens from "certain government actions regardless of the fairness of the procedures used to implement them. . . ." *Daniels v. Williams*, 474 U.S. 327, 106 S. Ct. 662, 88 L. Ed. 2d 662 (1986). There are currently two tests by which courts examine substantive due process claims. Under the first test, a plaintiff does not need to allege a violation of a specific liberty or property interest; rather, he must demonstrate that the state's conduct "shocks the conscience." *Rochin v. California*, 342 U.S. 165, 72 S. Ct. 205, 96 L. Ed. 183 (1952). Under the second test, a plaintiff must demonstrate a violation of a specific liberty or property interest protected by the Fourteenth Amendment. *See Meyer v. Nebraska*, 262 U.S. 390, 43 S. Ct. 625, 67 L. Ed. 1042 (1923).

In resolving the Respondents' Motion to Dismiss, the District Court relied principally upon the Court's decision in *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 109 S. Ct. 988, 103 L. Ed. 2d 249 (1988). *DeShaney* clearly establishes that the state does not have a constitutional duty to protect its citizens from *private violence*. *DeShaney*, 489 U.S. at 197. However, in *DeShaney*, the Court

recognized a distinction between the case before it and other cases in which the state *created* the risk faced by the plaintiff.

> While the State may have been aware of the dangers that [the plaintiff] faced in the free world, that played no part in their creation, *nor did it do anything to render him anymore vulnerable to them.* [By returning the plaintiff child to his abusive father, the State] placed him in no worse position than that in which he would have been had it not acted at all.

Id. at 201 (emphasis added).

The question before the Court in *DeShaney* was whether the plaintiff could obtain monetary relief against the defendants pursuant to 42 U.S.C. § 1983 for their alleged violation of the "substantive component" of the Due Process Clause. The Court held that it could not, observing that the purpose of the substantive Due Process protections available under the Fourteenth Amendment was to protect people from the abuse of governmental power and "not to ensure that the State protected them *from each other.*" *DeShaney* 109 S. Ct. at 1003 (emphasis added).

Central to this Court's analysis in *DeShaney* was its conclusion that the state's decision to assume temporary custody of Joshua DeShaney "placed him in no worse position than that in which he would have been had it not acted at all." *DeShaney* 109 S. Ct. at 1006. The Court concluded that the state in that case did not "become the permanent guarantor" of Joshua's safety by "having once offered him shelter." *DeShaney* left open the possibility that a state may be constitutionally required to protect someone from harm if the state itself engaged in conduct that enhanced the risk of harm. *See White v. Rochford*, 592 F.2d 381 (7th Cir. 1979).

DeShaney left several important legal questions unanswered: (1) what are the "non-custodial" circumstances under which a state's failure to provide services will violate the Due Process Clause; (2) under what circumstances will state action that increases the risk of injury give rise to a due process violation; and (3) to what persons, other than prisoners and involuntary mental patients, does the state owe a due process duty of care because he or she is, effectively, in state "custody?" The facts surrounding the police stop of Grover and Judith Lucas present this Court the appropriate backdrop in which to define the parameters of *DeShaney* and address the above unanswered questions.

DeShaney explicitly recognized that state action which enhances the risk of private harm may indeed violate the Due Process Clause. *Cf. Bowers v. DeVito*, 686 F.2d 616, 618 (7th Cir. 1982). Federal decisional law supports this conclusion. In *Wood v. Ostrander*, 879 F.2d 583 (9th Cir. 1989), *cert. denied*, 498 U.S. 938, 111 S. Ct. 341, 112 L. Ed. 2d 305 (1990), the Ninth Circuit analyzed the issue before it in qualified immunity terms without reference to the *DeShaney* analysis. In *Wood*, the Court found that the plaintiff alleged a due process claim against a police officer.

In *Wood*, a police officer arrested a man for driving while intoxicated. The arresting officer impounded the man's car, and he left the man's female companion in a high-crime area. She was subsequently raped by an unknown man with whom she accepted a ride. The Ninth Circuit concluded that a reasonable officer would have understood that his conduct violated the plaintiff's due process right "to be free from an unjustified intrusion into her personal security in violation of her liberty interest under the fourteenth amendment." *Wood*, 879 F.2d at 596. The Court in *Wood* determined that the record presented a factual question as to whether the police officer acted with

"deliberate indifference" to the plaintiff's liberty interests when he placed her in a position of danger.

Cases interpreting *DeShaney* draw distinctions between state action and inaction on one hand and increased and decreased risk on the other. For example, in *Cornelius v. Town of Highland Lake*, 880 F.2d 348 (11th Cir. 1989), *cert. denied*, 494 U.S. 1066, 110 S. Ct. 1784 (1990), a town clerk alleged that she had been abducted and terrorized by two inmates given community work assignments in the area of the town hall. She claimed that the prison and town officials who gave the inmates these work assignments failed to ensure that only non-violent offenders would be eligible to work in the community and that they failed to supervise the inmates adequately.

The Eleventh Circuit in *Cornelius* found *DeShaney* distinguishable because the state, which had custody over the inmates, *affirmatively* created a potentially dangerous situation when it allowed the inmates to perform a work assignment in and around the town hall. The Court also noted that there was a factual question as to whether the defendants in *Cornelius* violated the plaintiff's due process rights by placing her in "special danger."

Pre-*DeShaney* cases addressing due process issues have recognized the importance of the state action/inaction distinction. In *Martinez v. California*, 444 U.S. 277, 100 S. Ct. 553, 62 L. Ed. 2d 481 (1980) the Supreme Court ruled that the state was not responsible for wrongdoing because its release of a prisoner was the proximate cause of a death. Of significance, the decedent was not under the control of the state of the time of the death.

Both *Cornelius* and *Martinez* are consonant with the Court's reasoning in *DeShaney* with regard to the action/inaction and

the increased/decreased risk distinction. *DeShaney* stated that prior decisions stood

> for the proposition that when the State takes a person into its custody and holds him there against his will, the constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being.

DeShaney 109 S. Ct. at 1005.

The foregoing principles have been extended to persons who are in the functional equivalent of state custody, including involuntarily committed persons, *Youngberg v. Romeo*, 457 U.S. 307, 102 S. Ct. 2452, 73 L. Ed. 2d 28 (1982), pre-trial detainees, *Simmons v. City of Philadelphia*, 728 F. Supp. 352 (E.D. Pa. 1990), and confined juveniles, *Germany v. Vance*, 868 F.2d 9 (1st Cir. 1989). Although these cases appear to be predicated upon what is referred to as the "special relationship" theory, that term does not have a legally precise meaning. It is merely used to describe "cases in which the state either deliberately inflicted injury or greatly increased risk while *constricting* access to self-help." *Archie v. City of Racine*, 847 F.2d 1211, 1223 (7th Cir. 1988), *cert. denied*, 489 U.S. 1065, 109 S. Ct. 1338, 103 L. Ed. 2d 809 (1989) (emphasis added).

DeShaney did not define precisely how large a role the state must play in increasing the danger and vulnerability of a citizen for constitutional liability to attach. However, cases interpreting that decision have recognized that "at some point such actions [by the state] do create such a duty." *Pinder v. Johnson*, 33 F.3d 368, 369-371 (4th Cir. 1994).

Post-*DeShaney* decisions recognize that police officers may indeed be subject to suit under Section 1983 "if they knowingly

and affirmatively create a dangerous situation for the public and fail to take reasonable steps to defuse the danger." *Reed v. Gardner*, 986 F.2d 1122, 1127 (7th Cir.), *cert. denied*, 114 S. Ct. 389 (1993). *See also Freeman v. Ferguson*, 911 F.2d 52, 55 (8th Cir. 1990) (court recognized possibility of constitutional duty to protect an individual against *private violence in non-custodial* setting if state takes affirmative action increasing the individual's danger); *Sadrud-Din v. Chicago*, 883 F. Supp. 270 (N.D. Ill. 1995) (city had a due process duty to protect a victim because it had "affirmatively contributed" to it); *Doe v. Paukstat*, 863 F. Supp. 884 (E.D. Wis. 1994) (Section 1983 plaintiff stated a due process claim against teacher who sexually molested student); *Russell v. Steck*, 851 F. Supp. 859, 864 (N.D. Ohio 1994) (proper Section 1983 claim stated because defendant officer "actively placed [the plaintiff] in harm's way" so *DeShaney* not controlling); *C.N. v. Southeast Delco School District*, 828 F. Supp. 1179, 1189 (E.D. Pa. 1993) (*DeShaney* distinguished because injuries were inflicted by a *public official* and *not*, as in *DeShaney*, by a *private party*), *Estate of Sinthasomphone v. Milwaukee*, 785 F. Supp. 1343 (E.D. Wis. 1992) (complaint stated substantive due process claim when police returned 14 year old boy to Jeffrey Dahmer. *DeShaney* distinguished).

The cases set forth above have found due process violations in a variety of circumstances that do not fall neatly into the cryptic "special relationship test" relied upon by the District Court in this case. These cases recognize that the interests protected by the Fourteenth Amendment embrace the right to safety from physical, psychological and emotional harm, as well as the right to governmental services that are necessary to prevent such harms. For these reasons, the District Court improperly applied *DeShaney* when it granted the Respondents' Motion to Dismiss.

A key issue in the instant case is whether the constitutional duty not to affirmatively abuse governmental power so as to create danger to individuals and render them more vulnerable to harm was clearly established at the time of the events giving rise to this suit. What the Third Circuit termed the " 'state-created danger theory,' " *Kneipp v. Tedder*, 95 F.3d 1199, 1201 (3rd Cir. 1996) has been recognized by some federal courts as a viable mechanism for establishing a constitutional claim at least since 1979. *See White v. Rochford*, 592 F.2d 381, 383 (7th Cir. 1979) (finding Due Process Clause violation where "unjustified and arbitrary refusal of police officers to lend aid to children endangered by the performance of official duty . . . ultimately result[ed] in physical and emotional injury to the children"); *see also Cornelius v. Town of Highland Lake*, 880 F.2d 348 (11th Cir. 1989), *cert. denied*, 494 U.S. 1066, 110 S. Ct. 1784 (1990); *Wood v. Ostrander*, 879 F.2d 583 (9th Cir. 1989), *cert. denied*, 498 U.S. 938, 111 S. Ct. 341, 112 L. Ed. 2d 305 (1990); *Checki v. Webb*, 785 F.2d 534, 538 (5th Cir. 1986).

In *DeShaney*, the Supreme Court acknowledged that the state actions that create dangers or render private citizens more vulnerable to harm could amount to constitutional violations. *See DeShaney*, 489 U.S. at 201.[3] Since *DeShaney*, seven circuit

3. Remarkably, the Sixth Circuit has most recently recognized the "unanswered questions" left by *DeShaney*; even more remarkably, the same court that affirmed the dismissal of the matter now pending has also most recently reached an opposite result in a separate claim with a very similar fact pattern and an identical legal theory — that being a cause of action under 42 U.S.C. § 1983. In *Stemler v. City of Florence*, 28 SCR 20, October 28, 1997, p. 6 (6th Circuit Slip Opinion Nos. 96-5993 and 96-5996), the court reversed a dismissal of a claimant's civil rights action under 42 U.S.C. § 1983, noting, among other things:

> . . . [W]hile the state does not owe its citizens a constitutional duty to keep them from harm in all circumstances, it has been

(Cont'd)

court of appeals have recognized that state-created dangers may, in proper circumstances, give rise to constitutional claims under section 1983. *See Kneipp*, 95 F.3d at 1208 (citing cases and tracing history of state-created danger theory). Moreover, a violation of clearly settled law may be found even where the

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(Cont'd)

> clearly established that such a duty will arise when the state has acted to deprive an individual of certain indicia of liberty[.] . . . *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 200 (1989) (citation omitted); *see also Youngberg v. Romeo*, 457 U.S. 307, 315-16 (1982) [.] . . . In the present case, Black's complaint alleges — and the record evidence could reasonably be read to show — that the officers threatened to arrest her if she did not leave in Kritis's truck, and they physically lifted her out of Stemler's car and placed her in the truck against her will. In so doing, the officers took the "affirmative act of restraining [Black's] freedom to act on her [own] behalf," and consequently imposed upon themselves a duty to ensure that they were not placing her in danger. Their actions were, in the words of *DeShaney*, a restraint on Black's personal liberty, not a failure to act on her behalf . . .
>
> While it is clear that the state owes a duty of care to an individual who has suffered a deprivation of liberty by the state — *e.g.*, an individual who has been in the state's custody — there is also dicta in *DeShaney* that suggests that the state may also owe a duty to individuals in non-custodial settings [.] . . . 489 U.S. at 201. . . . The defendants argue that this rule was not clearly established in February of 1994, and remains unclear today. We need not opine as to the circumstances under which a substantive due process claim in a non-custodial setting is possible, or as to whether that possibility had been clearly established in 1994. Under any definition of the term, Black was in the defendant officers' custody at the time she was forced into Kritis's truck. . . . [W]e hold that the defendants should have known under clearly established law that they owed Black a duty not to force her into harm's way. . . . (*Id.* at 7).

Supreme Court and the circuit in question have not specifically addressed the question. *See* 2 Nahmood, *Civil Rights and Civil Liberties Litigation: The Law of Section 1983*, § 8.07, at 134-35 (3d ed. 1991) (citing cases).

The situation at issue in the instant case arises from a state actors *affirmative acts*, which did play a role in creating the danger to Judith and rendering her more vulnerable to harm. Accordingly, the allegations in the Complaint are actionable under *DeShaney*. They implicate "the alternative framework of § 1983 liability wherein a plaintiff alleges that some conduct by an officer *directly* caused harm to the plaintiff." *Pinder*, 54 F.3d at 1176 (emphasis in original). This distinction between a "duty to protect" case and a "state created danger" case was artfully described by Judge Posner in *Bowers v. DeVito*, 686 F.2d 616, 618 (7th Cir. 1982). He observed that if "the state puts a man in a position of danger from private persons and then fails to protect him, . . . it is as much an active tortfeasor as if it had thrown him into a snake pit." *Id.*

In the instant case, Trooper Sanders affirmatively acted so as to increase the risk of harm to Judith Lucas. His conduct imposed an affirmative obligation upon him to take appropriate steps when confronted with a medical emergency. Specifically, Sanders stopped the Lucas vehicle and was immediately told that Grover was responding to a medical emergency. Rather than address this emergency, he proceeded to berate Grover. He eventually took Judith's pulse and concluded that she was "okay."

Notwithstanding the fact that Judith was suffering a heart attack, Sanders delayed Grover's attempt to get his dying wife to the hospital, and this delay was for no other purpose other than to berate Grover. Rather than follow Kentucky State Police Procedures for emergency situations, Sanders, incredibly, gave Grover the option of calling an ambulance. Yet, at that time,

Grover was emotionally distraught, and his distress ought to have been readily apparent to even the most callously disinterested lay observer.

Finally, Sanders told Grover that he would follow him to the hospital and that if Grover exceeded the speed limit he would arrest him and take him to jail. This had the further effect of delaying Grover's efforts to obtain appropriate medical care for his dying wife. Given these facts, it is impossible to conclude, as the District Court did, that "[n]o limitations were imposed on Ms. Lucas' freedom to act on her own behalf" (Memorandum Opinion at 9) and it is also impossible to conclude, as the District Court did, that the Petitioners were not "restricted in any way." *Id.* at 9.

The District Court held that the State "played no part in the creation of danger faced by Ms. Lucas," and that Trooper Sanders did not "do anything to render her more vulnerable to her heart condition." *Id.* at 10. The District Court also held that it was "Ms. Lucas' medical condition, not Trooper Sanders, [that] created her peril." *Id.*

Finally, the District Court concluded that Trooper Sanders did nothing to render Judith "more vulnerable to her heart condition."[4] Memorandum Opinion at 10. In that she was experiencing a heart attack while Sanders lectured her husband, she was dying. The District Court overlooked the fact that some people who are experiencing an otherwise fatal heart attack will recover when provided proper medical care. Sanders did nothing to increase the probability of Judith surviving the heart attack. Indeed, his detention of Judith and Grover, and his disregard of

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4. This is a medical question that cannot be resolved by the trial court in the absence of *some* proof or evidence on this issue; however, the trial court determined to dismiss this action before ever allowing the development of *any* proof on this issue.

State policies and procedures regarding emergencies, increased the risk of her death. The Complaint specifically alleges that Judith died as a proximate result of Sanders' conduct. *See* Complaint, paragraph 9. For these reasons, it was error for the District Court to grant the Respondents' Motion to Dismiss.

II.

THE SIXTH CIRCUIT ERRED IN CONCLUDING THAT A KENTUCKY STATE TROOPER'S DETENTION AND VERBAL ABUSE OF A MOTORIST IN ACUTE CARDIAC DISTRESS DID NOT VIOLATE A CLEARLY ESTABLISHED SUBSTANTIVE DUE PROCESS RIGHT WHICH WOULD GIVE RISE TO A CLAIM FOR RELIEF PURSUANT TO 42 U.S.C. § 1983.

In *Rochin v. California*, *supra*, the Supreme Court held that the forcible pumping of a suspect's stomach by police to obtain evidence that would inculpate the suspect at trial "shocks the conscience[,]" thus violating the suspect's due process rights. *Rochin v. California*, 342 U.S. 165, 172 (1952). The Court explained that in order to amount to a due process violation the police conduct must "do more than offend some fastidious squeamishness or private sentimentalism about combating crime too energetically." *Id.* Nevertheless, the conduct complained of in *Rochin*, the Court held, was "too close to the rack and the screw to permit of constitutional differentiation." *Id.*

Only if a court finds that a defendant has violated a constitutional right does it reach the issue of qualified immunity and, consequently, the question of whether that right was clearly established at the time a defendant acted. *See Harlow v. Fitzgerald*, 457 U.S. 800, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982). In order to be clearly established, the "contours of the right must be sufficiently clear that a reasonable official would

understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987).

In *Fernandez v. Leonard*, 784 F.2d 1209 (1st Cir. 1986), the First Circuit held that "the very concept of a violation of substantive due process is that the conduct complained of is *impermissible per se* and is thus *necessarily clearly established*." *Id.* at 1216 (emphasis added). Likewise, in *deLeiris v. Scott*, 642 F. Supp. 1552 (D.R.I. 1986) (Selya, District Judge), the court citing *Fernandez*, stated that violations of substantive due process are "impermissible per se," *see id.* at 1567, and "inherently violative of due process." *Id.* at 1568. The Seventh Circuit also has stated that

> [a] constitutional violation that is so patent that no violator has even attempted to obtain an appellate ruling on it can be regarded as clearly established even in the absence of precedent.

Anderson v. Romero, 72 F.3d 518, 526-27 (7th Cir. 1995).

A reasonable person who engages in conscience-shocking behavior should know at the time that he is violating an individual's substantive due process rights, regardless of whether such conduct has previously been subject to judicial scrutiny. Conduct that clearly shocks the conscience, such as that involved here, does not require quiet deliberations to conclude that it is violative of due process; rather it is "in and of itself . . . egregiously unacceptable [and] outrageous . . .[,]" *Amsden v. Moran*, 904 F.2d 748, 754 (1st Cir. 1990), and should be clearly repugnant to a reasonable officer required to act on the spur of the moment. Simply because there is no clearly defined case law condemning certain conduct does not mean police officers should be free to engage in such conduct, no matter how

offensive or destructive to a fair and just society that conduct may be, and then hide behind the shield of qualified immunity. Even in the absence of precedent, conduct that shocks the conscience is so patently egregious that the constitutional right it violates is necessarily clearly established and a reasonable officer should know that his conduct violates that right.

The question of whether or not the conduct in issue should be characterized as outrageous should have been submitted to a jury, as opposed to having been resolved by the court on a Fed. R. Civ. P. 12(b)(6) motion.

III.

THE SIXTH CIRCUIT ERRED IN CONCLUDING THAT A KENTUCKY STATE TROOPER'S DETENTION AND VERBAL ABUSE OF A MOTORIST, WHO WAS IN ACUTE CARDIAC DISTRESS AND EN ROUTE TO A HOSPITAL EMERGENCY ROOM AT THE INSTRUCTION OF A PHYSICIAN, DID NOT GIVE RISE TO A CLAIM UPON WHICH RELIEF COULD BE GRANTED UNDER THE FOURTH AMENDMENT PURSUANT TO 42 U.S.C. § 1983.

A. Fourth Amendment

The Fourth Amendment of the United States Constitution declares, "The right of the people to be secure in their persons . . . against unreasonable . . . seizures, shall not be violated. . . ." U.S. Const. amend. IV. The District Court did not analyze the Petitioners' Fourth Amendment claim. It simply concluded that the case was subject to dismissal under the *DeShaney* analysis. As stated in the preceding section, the Court's *DeShaney* analysis was misplaced because that case did not involve a governmental actor who actively placed a plaintiff in harm's way. Moreover,

the Petitioners have alleged that the Respondents violated their Fourth Amendment right to be free from an unreasonable seizure. This Fourth Amendment claim should have survived the Motion to Dismiss.

In the context of a Fourth Amendment claim brought pursuant to Section 1983, the first question that the Court must ask is whether there was a seizure. A seizure requires either the application of physical force or submission to the assertion of state authority. *See California v. Hodari*, 499 U.S. 621, 111 S. Ct. 1547, 113 L. Ed. 2d 690 (1991). A court's inquiry as to whether a given action constitutes a "seizure" under the Fourth Amendment is separate from the inquiry as to whether an action, found to constitute a Fourth Amendment seizure, is "unreasonable." *Pleasant v. Zamieski*, 895 F.2d 272, 277 (6th Cir. 1990).

A seizure occurs if, under all of the circumstances, a reasonable person would have believed "that his freedom of movement was restrained, or that he did not remain at liberty to disregard a police officer's request for information." *Pliska v. City of Steven's Point*, 823 F.2d 1168, 1176 (7th Cir. 1987). There is nothing in the record before the Court that would allow it to conclude that Grover and Judith believed that they were "at liberty" to disregard Sanders stop of their vehicle, his questions to them or his unceasing beratement.

The Complaint alleges that the Petitioners were unreasonably seized and that this unreasonable seizure was the proximate cause of Judith's subsequent death. These allegations, with respect to the reasonableness — or lack thereof — of Sanders' conduct find support in the Complaint. It is alleged that he violated Kentucky State Police Policies and Procedures regarding medical emergencies. Medical emergencies are, after all, frequently encountered by members of the law enforcement

community. It takes no special expertise for someone to conclude that Sanders' conduct toward the Petitioners, on its face, demonstrated a woeful lack of concern for the fact that Judith was dying.

B. Supervisory Liability

The Petitioners' Amended Complaint named Paul Isaacs, the Commissioner of the Kentucky State Police, and Captain Kenneth Hardin, the Kentucky State Police Post Commander, as Respondents. The claims against these two individuals were predicated upon allegations that they approved, authorized, recommended, affirmed, and/or ratified the conduct of Trooper Sanders. The District Court dismissed the claims against Hardin and Isaacs because it found that "Trooper Sanders did not violate [the Petitioners'] constitutional rights." Memorandum Opinion and Order at 13. Consequently, the District Court reasoned that they could not "be held liable for encouraging conduct that is not actionable under § 1983." *Id.*

As the preceding sections of this Petition demonstrate, the conduct of Trooper Sanders is actionable under Section 1983. Accordingly, the claims against Hardin and Isaacs were improperly dismissed for failure to state a claim upon which relief may be granted.

CONCLUSION

For all of the foregoing reasons, Petitioner Patricia Fulton requests that the Court grant her petition for writ of certiorari and that the Court award such other and further relief as it deems just and appropriate.

Respectfully submitted,

MATTHEW J. BAKER
Counsel of Record
COLE, MOORE & BAKER
921 College Street
P.O. Box 10240
Bowling Green, KY 42102-7240
(502) 782-6666

WILLIAM R. FISHER
MONAGHAN, LEAHY,
HOCHADEL & LIBBY, LLP
95 Exchange Street
P.O. Box 7046
Portland, ME 04112-7046
(207) 774-3906

Attorneys for Petitioners

APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT FILED AUGUST 13, 1997

Case No: 96-6152

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ORDER

PATRICIA FULTON, Personal Representative of the Estate of JUDITH LUCAS and GROVER LUCAS

Plaintiff - Appellant

v.

RICKY SANDERS; KENNETH HARDIN, Kentucky State Police; GENE PETERS; PAUL ISAACS

Defendants - Appellees

BEFORE: KRUPANSKY and SUHRHEINRICH, Circuit Judges, and ROSEN, District Judge.*

This cause having come on to be heard upon the record, the briefs and the oral argument of the parties, and upon due consideration thereof,

It is **ORDERED** that the judgment of the district court be, and it hereby is, affirmed upon the opinion of the district court.

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* The Honorable Gerald E. Rosen, United States District Judge for the Eastern District of Michigan, sitting by designation.

Appendix A

ENTERED BY ORDER OF THE COURT

s/ Leonard Green
Leonard Green, Clerk

APPENDIX B — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY, BOWLING GREEN DIVISION ENTERED AUGUST 9, 1997

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
BOWLING GREEN DIVISION

CIVIL ACTION NO. 1:96-CV-7-M

PATRICIA FULTON, Personal Representative of the Estate of JUDITH LUCAS and GROVER LUCAS

PLAINTIFF

VS.

RICKY SANDERS, KENNETH HARDIN and GENE PETERS

DEFENDANTS

MEMORANDUM OPINION AND ORDER

This matter is before the Court on a motion by Defendants, Ricky Sanders, Kenneth Hardin and Gene Peters, in their individual and official capacity, to dismiss this action pursuant to Fed. R. Civ. P. 12(b)(6) [DN2]. This is a civil rights action brought pursuant to 42 U.S.C. §1983[1] alleging violation of

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1. 42 U.S.C. § 1983 provides as follows:

> Every person who, under cover of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any

(Cont'd)

Appendix B

Plaintiff's Fourth and Fourteenth Amendment rights to the United States Constitution. Fully briefed, this matter is now ripe for decision. For the reasons set forth below, Defendants' motion is granted.

I. Standard of Review

In deciding a Fed. R. Civ. P. 12(b)(6) motion to dismiss, the complaint must be liberally construed and viewed in the light most favorable to Plaintiff. *See* Federal Procedure: Lawyers Edition §62:467 (1984 & Supp. 1994); *Scheuer v. Rhodes*, 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974); *Davis H. Elliott Co., Inc. v. Caribbean Utilities Co., Ltd.*, 513 F.2d 1176 (6th Cir. 1975). The complaint may not be dismissed "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957). *See also Hartford Fire Insurance Co. v. California*, 509 U.S. 764, 113 S.Ct. 2891, 125 L.Ed.2d 612 (1993). " '[A] complaint need not set down in detail all the particularities of a plaintiff's claim (citation omitted), the complaint must give the defendant 'fair notice of what the plaintiff's claim is and the grounds upon which it rests.' " *Gazette v. City of Pontiac*, 41 F.3d 1061, 1064 (6th Cir. 1994) (quoting *Conley*, 355 U.S. at 47, 78 S.Ct. at 103). "[A] 12(b)(6) motion tests whether the plaintiff has stated a claim for which the law provides relief." *Gazette*, 41 F.3d at 1064.

(Cont'd)

> citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, sued in equity, or other proper proceeding for redress.

Appendix B

II. FACTS

On June 21, 1995, at approximately 3:55 p.m., Kentucky State Police Trooper Ricky Sanders was on Old 31 W, north of Bowling Green. Grover Lucas drove by at a high rate of speed. Trooper Sanders pursued and stopped the vehicle at 3:59 p.m. Mr. Lucas got out of his vehicle and informed Trooper Sanders that he was driving to his wife's doctor's office. After chastising Mr. Lucas for his reckless operation of the vehicle, and without issuing any citation, Trooper Sanders released Mr. Lucas at 4:02 p.m., and followed him to the doctor's office. Trooper Sanders had a brief conversation with Ms. Lucas. She informed him she was not feeling well. Mr. Lucas declined Trooper Sanders offer to summon an ambulance. Ms. Lucas died the next day.

Section 1983 alone does not create substantive rights. To sustain an action under 42 U.S.C. §1983, a Plaintiff must show that (1) the Plaintiff was deprived of a federally protected right and (2) the person who deprived Plaintiff of that right acted under color of state law. *Rogers v. City of Port Huron,* 833 F. Supp. 1212, 1216 (E.D. Mich. 1993). There is no dispute that Officer Sanders was acting under the color of state law at the time of the incident alleged by Plaintiff.

III. DISCUSSION

Officials who perform discretionary functions generally have qualified immunity from individual liability for damages that have resulted from exercising their discretionary functions. *Johnson v. Estate of Laccheo,* 935 F.2d 109, 111 (6th Cir. 1991). The question of whether an official is protected by qualified immunity turns on the "objective legal reasonableness" of the action assessed in light of the legal rules that were "clearly

established" at the time it was taken. *Harlow v. Fitzgerald,* 457 U.S. 800, 818-19, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). Individual claims of immunity must be analyzed on a fact-specific, case-by-case basis to determine whether Plaintiffs' federal or constitutional rights were so clearly established when the alleged misconduct was committed that a reasonable official in the Defendant's position would understand that what one is doing violates those rights. *Anderson v. Creighton,* 483 U.S. 635, 640, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987). "This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, . . . but it is to say that in the light of pre-existing law the unlawfulness must be apparent." *Id.* The resolution of qualified immunity is purely a question of law, and the trial judge bears the ultimate responsibility of resolving the questions raised by a defense of qualified immunity. *Hetlin v. Stewart County, Tenn.,* 958 F.2d 709, 717 (6th Cir.), *cert. denied,* 506 U.S. 998, 113 S.Ct. 598, 121 L.Ed.2d 535 (1992) (citing *Poe v. Haydon,* 853 F.2d 418, 424 (6th Cir. 1988), *cert. denied,* 488 U.S. 1007, 109 S.Ct. 788, 102 L.Ed.2d 780 (1989)).

"The ultimate burden of proof is on the plaintiff to show that the defendant[is] not entitled to qualified immunity." *Rich v. City of Mayfield Heights,* 955 F.2d 1092, 1095 (6th Cir. 1992). Defendant bears the initial burden of coming forward with facts to suggest that he was acting within the scope of his discretionary authority during the incident in question. Thereafter, the burden shifts to the Plaintiff to establish that the Defendant's conduct violated a right so clearly established that any official in Defendant's position would have clearly understood that he was under an affirmative duty to refrain from such conduct. *Id.* "Unless the Plaintiff's allegations state a claim of clearly established law, a defendant pleading qualified immunity is

entitled to dismissal before the commencement of discovery." *Mitchell v. Forsyth,* 472 U.S. 511, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985); *Poe v. Haydon,* 853 F.2d 418 (6th Cir. 1988), *cert. denied,* 109 S.Ct. 788 (1989).

Since qualified immunity is raised by Defendants on a motion to dismiss, the Court must assume the truth of the factual allegations of the complaint and construe them in Plaintiff's favor. Because qualified immunity is "an immunity from suit rather than a mere defense to liability," the Supreme Court and Sixth Circuit have acknowledged the importance of deciding qualified immunity at the earliest possible stage of the litigation. What occurred on June 21, 1995, is not in dispute. A videotape of the stop was submitted by the Plaintiff. As a result, the question of qualified immunity of Trooper Sanders is appropriately decided on the motion to dismiss.

In analyzing whether Sanders is entitled to qualified immunity, the Court must follow the structural analysis set forth in *Siegert v. Gilley,* 500 U.S. 226, 231, 111 S.Ct. 1789, 1793, 114 L.Ed.2d 277 (1991). "A necessary concomitant to the determination of whether the constitutional right asserted by a plaintiff is 'clearly established' at the time the defendant acted is the determination of whether the plaintiff has asserted a violation of a constitutional right at all." *Id.* at 231, 111 S.Ct. at 1793. *See also Silver v. Franklin Township,* 966 F.2d 1031, 1035 (6th Cir. 1992).

In response to the Defendants' motion to dismiss, the Plaintiff states that "Plaintiff have alleged that Sanders violated their Fourth and Fourteenth Amendment rights. Whether or not the Plaintiff and his deceased wife were in the 'custody' of Sanders or whether a 'special relationship' existed between them

is not the issue at this stage of the proceedings. The question is whether the Complaint alleges a constitutional violation. The constitutional violation clearly appears in the Complaint, and the Defendants cannot seriously contend that the Fourth and Fourteenth Amendment rights of Judith and Grover Lucas were not 'clearly established' as of June 21, 1995." (Plaintiff's Response to Motion to Dismiss at 5.)

The Court would note at this juncture that "[t]he abstract right of substantive due process is indeed well established. (citation omitted) However, [the court's] analysis must not be abstract but 'on a fact-specific, case-by-case basis.' " *Chipman v. City of Florence,* 858 F. Supp. 87, 90 (E.D. Ky. 1994), *reconsideration denied,* 866 F. Supp. 332 (E.D. Ky. 1994). Plaintiff in this case must do more than generally allege a violation of Ms. Lucas' Fourth and Fourteenth Amendment rights. The burden is on the Plaintiff to demonstrate that the Defendants owed Ms. Lucas a duty to provide medical care/ transportation and that such right was clearly established at the time of the incident. Such a duty only arises if Ms. Lucas was in the custody of Trooper Sanders or a special relationship existed between them. Thus, contrary to Plaintiff's contention, the precise issue at this stage of the proceeding is whether custody or a special relationship existed.

Substantive Due Process

The Due Process Clause of the Fourteenth Amendment provides that "[n]o state shall . . . deprive any person of life, liberty, or property without due process of law." Specifically, Plaintiff contends that "the actions of Defendant Sanders in dealing with this medical emergency were not objectively reasonable in light of the facts and circumstances which he knew

or should have known at the time, and Sanders acted with a reckless disregard for, or deliberate indifference to, the rights of Judith Lucas." (Amended Complaint at ¶ 8).

No general constitutional right to receive medical treatment exists. *Estelle v. Gamble,* 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976) (Failure or refusal to provide treatment to prisoners when indicating a "deliberate indifference to serious medical needs of prisoners" is a violation of the Eighth Amendment), *Youngberg v. Romeo,* 457 U.S. 307, 102 S.Ct. 2452, 73 L.Ed.2d 28 (1982) (State has a duty to provide persons involuntarily committed to mental institutions with certain services and care as necessary for reasonable safety). "[T]he Constitution is a charter of negative liberties; it tells the state to let people alone; it does not require the federal government or the state to provide services, even so elementary as maintaining law and order.' " *Was v. Young,* 796 F. Supp. 1041, 1045 (E.D. Mich. 1992) (quoting *Bowers v. Devite,* 686 F.2d 616, 618 (7th Cir. 1982)). "[I]n certain limited circumstances the Constitution imposes upon the State affirmative duties of care and protection with respect to particular individuals." *DeShaney v. Winnebago County Department of Social Services,* 489 U.S. 189, 198, 109 S.Ct. 998, 1004, 103 L.Ed.2d 249 (1989).

"[T]he Due Process Clause imposes a duty on state actors to protect or care for citizens in two situations: first, in custodial and other settings in which the state has limited the individuals' ability to care for themselves; and second, when the state affirmatively places a particular individual in a position of danger the individual would not otherwise have faced." *Gregory v. City of Rogers, Ark.,* 974 F.2d 1006, 1010 (8th Cir. 1992), *cert. denied,* 507 U.S. 913, 113 S.Ct. 1265, 122 L.Ed.2d 661 (1993). Plaintiff asserts that Ms. Lucas falls within one of these limited

circumstances. Thus, the question before the Court is whether the Due Process Clause did impose an affirmative obligation on the State to provide some measure of care to Ms. Lucas.

First, Plaintiff claims that Ms. Lucas was in the custody of the State, or at least in functional custody of the State, establishing a special relationship between the State and Lucas.

A constitutional duty of care arises "when the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs — e.g., food, clothing, shelter, medical care, and reasonable safety." *DeShaney*, 489 U.S. at 200, 109 S.Ct. at 1005-1006 (citations omitted). *See also Rogers v. City of Port Huron*, 833 F. Supp. 1212 (E.D. Mich. 1993). The Supreme Court explained that "when the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being." *Id.* at 199-200, 109 S.Ct. at 1005. This duty encompasses convicted prisoners, *Estelle v. Gamble*, 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251; *Robinson v. California*, 370 U.S. 660, 82 S.Ct. 1417, 8 L.Ed.2d 758 (1962); involuntarily committed mental patients, *Youngberg v. Romeo*, 457 U.S. 307, 102 S.Ct. 2452, 73 L.Ed.2d 28, arrestees, *Revere v. Massachusetts General Hospital*, 463 U.S. 239, 244, 103 S.Ct. 2979, 2983, 77 L.Ed.2d 605 (1983) (Due Process Clause requires the responsible government or governmental agency to provide medical care to suspects in police custody who have been injured while being apprehended by police); and, children in state regulated foster homes, *Meador v. Cabinet for Human Resources*, 902 F.2d 474, 476 (6th Cir.), *cert. denied*, 498 U.S. 867, 111 S.Ct. 182, 112 L.Ed.2d 145 (1990) (functional custody).

Appendix B

The affirmative duty of care or protection "arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf." *DeShaney*, 489 U.S. at 200, 109 U.S. at 1005-1006. Thus, "it is the State's affirmative act of restraining the individual's freedom to act on his own behalf — through incarceration, institutionalization, or other similar restraint of personal liberty — which is the 'deprivation of liberty' triggering the protections of the Due Process Clause, not its failure to act to protect his liberty interests against harms inflicted by other means." *Id.* at 200, 109 S.Ct. at 1006. *See also Foy v. City of Berea*, 58 F.3d 227 (6th Cir. 1995)[2]; *Purdy v. Newland*, 39 F.3d 1182, 1994 WL 601341 (6th Cir. 1994).

Courts have attempted "to define the limits of functional custody, where the State has exercised some degree of control or restriction which is less complete than that in a police station

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2. In *Foy*, the estate of an automobile passenger brought an action under § 1983 against a city police officer who ordered the passenger and an intoxicated driver to get in their car and leave. The Sixth Circuit, quoting *DeShaney*, held that "[i]t is the State's affirmative act of restraining the individual's freedom to act on his own behalf — through incarceration, institutionalization, or other similar restraint of personal liberty — which is the 'deprivation of liberty' triggering the protections of the Due Process Clause, not its failure to act to protect his liberty interests against harms inflicted by other means." *Foy*, 58 F.3d at 231. The Sixth Circuit found that the defendants did nothing to prevent Foy from protecting himself as a result, the court found no special relationship between the passenger and the officers. *Id.* at 231-232. "Neither the Supreme Court nor this court has announced a clearly established right of persons not in custody or incarcerated to recover for a substantive due process violation because the police permitted them to go on their way after a brief encounter." *Id.* at 232.

or prison." *Was v. Young*, 796 F. Supp. 1041, 1046 (E.D. Mich. 1992). The Sixth Circuit has recognized functional custody where a child has been placed in a state regulated foster home. *Meador*, 902 F.2d at 476. The Third Circuit has also found that a public high school student who had been sexually assaulted by a teacher might be considered to be "in custody" for purposes of §1983 because student attendance in school is required. *Stoneking v. Bradford Area School District*, 882 F.2d 720 (3d Cir. 1989), *cert. denied*, 493 U.S. 1044, 110 S.Ct. 840, 107 L.Ed.2d 835 (1990). However, it should be noted that a majority of the courts have rejected arguments that public school children, by virtue of compulsory attendance laws, are in the "functional custody" of the state during school hours. In addition, the Sixth Circuit has declined to extend a constitutional duty to protect to a voluntary committed mental patient in a state hospital. *Higgs v. Latham*, 946 F.2d 895, 1991 WL 216464 (6th Cir. 1991).

Courts have imposed a duty on a state to provide medical care and treatment for persons in situations less extreme than permanent incarceration or institutionalization. *See Wideman v. Shallowford Community Hospital, Inc.*, 826 F.2d 1030, 1034 (11th Cir. 1987) (Pre-DeShaney case which gives an excellent overview of the right to medical care and services). In *Molton v. City of Cleveland*, 839 F.2d 240 (6th Cir. 1988), *cert. denied*, 489 U.S. 1068, 109 S.Ct. 1345, 103 L.Ed.2d 814 (1989), the Sixth Circuit recognized that a pretrial detainee's constitutional rights under the Eighth and Fourteenth Amendments are denied by deliberate indifference to his serious medical needs. *Id.* at 243. Further, in *Revere*, 463 U.S. 239, 103 S.Ct. 2979, 77 L.Ed.2d 605, the Supreme Court held that the Due Process Clause required the government to provide medical care to persons who have been injured while being apprehended by the police.

Appendix B

Where a plaintiff claims the conduct of a defendant amounts to a deliberate indifference to his medical needs, "the 'deliberate indifference' standard applies only 'when the State takes a person into its *custody* and holds him their against his will.' " *Purdy*, 39 F.3d 1182, 1994 WL 601341, *1 (6th Cir. 1994) (quoting *DeShaney*, 489 U.S. at 199-200, 109 S.Ct. at 1005). The cases discussed above support the conclusion that a person is placed in "custody" only "when the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself." *Deshaney*, 489 U.S. at 200, 109 S.Ct. at 1005-06.

Plaintiff asserts that a "special relationship" existed between Trooper Sanders and Ms. Lucas. Plaintiff cites *Walton v. Alexander*, 44 F.3d 1297 (5th Cir. 1995), in which the Fifth Circuit held that the state school for the deaf had no constitutional duty to protect a voluntary resident from sexual assault. The Fifth Circuit discussed the category of persons in custody by means of "similar restraints of personal liberty" under *DeShaney* holding that *DeShaney* "stands for the proposition that the state creates a 'special relationship' with a person only when the person is involuntarily taken into state custody and held against his will through the affirmative power of the state." *Walton v. Alexander*, 44 F.3d at 1304. However, Ms. Lucas was not taken into state custody nor held against her will. Ms. Lucas was free to proceed to the doctor's office driven by her husband or was free to allow Trooper Sanders to summon an ambulance. No limitations were imposed on Ms. Lucas' freedom to act on her own behalf.[3]

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3. In support of Plaintiff's assertion that Ms. Lucas enjoyed a special relationship with Trooper Sanders, the Plaintiff cites *Baby Neal v. Casey*, 821 F. Supp. 320, 335 (E.D. Pa. 1993) (District court held that the children who had been involuntarily placed in the custody of DHS may state a (Cont'd)

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There was no custodial relationship between Trooper Sanders and Ms. Lucas in this case. Trooper Sanders did not restrain Lucas' freedom to act on her own behalf. Lucas was neither incarcerated, institutionalized, arrested, or restricted in any way. Without such a limitation imposed on Lucas' freedom to act on her own behalf, *DeShaney* indicates Lucas was due no affirmative constitutional duty of medical transportation or care from the State.

Plaintiff also asserts that the State owed Ms. Lucas a duty to protect her from harm when it places a person at risk of harm.[4]

(Cont'd)
claim for violation of their substantive due process rights based upon the right to freedom from harm.); *Walton v. Alexander*, 44 F.3d 1297, 1308-09 (5th Cir. 1995); *Ringuette v. City of Fall River*, 888 F. Supp. 258 (D. Mass. 1995) (Court held that State has duty to protect persons who are taken into protective custody because of incapacitation and who lack the capacity to give knowing, intelligent and voluntary consent to protective custody). *See also Horton v. Flenory*, 889 F.2d 454 (3d Cir. 1989) (Interrogation of burglary suspect by private club owner acquiesced in by police department policy and individual officer is custodial).

4. In support of this contention, Plaintiff cites the following cases: *White v. Rochford*, 592 F.2d 381 (7th Cir. 1979) (Seventh Circuit held that a claim for violation of constitutional rights arising out of an arrest by police officers of children's uncle and then abandoning children without adult protection stated a claim for deprivation of children's rights); *Bowers v. DeVito*, 686 F.2d 616 (7th Cir. 1982) (No §1983 action against state mental health officers for releasing mental patient who subsequently committed murder); *Cornelius v. Town of Highland Lake*, 880 F.2d 348 (11th Cir. 1989), cert. denied, 494 U.S. 1066 (1990) (Town clerk stated a claim under §1983 against town and prison officials for her abduction and terrorization by prison inmates because the town/prison had created a danger by allowing inmates to be present in the town on a community work squad.); *Gibson v. City of Chicago*, 910 F.2d 1510 (7th Cir. 1990)
(Cont'd)

Appendix B

In *DeShaney*, the Supreme Court suggested that a Constitutional violation may occur if the State played a role in creating the dangers to which a plaintiff is exposed or had increased a plaintiff's vulnerability to these dangers. *DeShaney*, 489 U.S. at 201, 109 S.Ct. at 1006. In *Russell v. Steck*, 851 F. Supp. 859 (N.D. Ohio 1994), the district court explained that after *DeShaney* "a number of courts have found a denial of due process, not only in situations in which a 'special relationship' between the plaintiff and the state gives rise to an affirmative duty of care, but also in those instances in which the state, by its own actions, has created dangers threatening the plaintiff's life or liberty." *Id.* at 864. The court found that the action of an officer ordering an intoxicated man to leave the premises placed the intoxicated man in harm's way and left him unable to act in his own best interest, and thus, could support a substantive due process claim. *Id.* at 868. The Sixth Circuit in *Foy*, 58 F.3d 227, rejected the holding in *Russell*, finding that the police in *Foy* did nothing to prevent the passenger from protecting himself. *See also Walton v. City of Southfield*, 995 F.2d 1331 (6th Cir. 1993); *Rogers v. City of Port Huron*, 833 F. Supp. 1212 (E.D. Mich. 1993).[5]

(Cont'd)

(Victim shot and killed by a police officer who had been placed on medical roll as mentally unfit stated a claim under §1983 against city and members of police department because defendants played a part in creating the danger by training the officer and rendering the public more vulnerable by allowing the officer to retain his weapon.)

5. *Wood v. Ostrander*, 879 F.2d 583 (9th Cir. 1989), *cert. denied*, 498 U.S. 938, 111 S.Ct. 341, 112 L.Ed.2d 385 (1990) (Trooper created the danger when he left arrested driver's female passenger stranded in high crime area during inclement weather); *White v. Rochford*, 592 F.2d 381 (7th Cir. 1979) (Police officer created the danger when he left young children in Chicago expressway). The Sixth Circuit in *Walton v. City of*

(Cont'd)

In this case the State played no part in the creation of danger faced by Ms. Lucas. Ms. Lucas' medical condition, not Trooper Sanders, created her peril. Nor did Trooper Sanders do anything to render her more vulnerable to her heart condition. *See DeShaney*, 489 U.S. at 201, 109 S.Ct. at 1006. Ms. Lucas was allowed to proceed to the doctor's office or accept the offer of transportation by ambulance.

In as much as Plaintiff claims that Trooper Sanders' knowledge of Ms. Lucas' medical condition alone creates a duty of care, the Court finds that a special relationship does not arise from Trooper Sanders' knowledge of Lucas' medical condition. "Mere knowledge of danger to the individual does not create an affirmative duty to protect." *Foy*, 58 F.3d at 231 (citing *DeShaney*, 489 U.S. at 200, 109 S.Ct. at 1005-06. *See also Smith v. Myers*, 65 F.3d 169, 1995 WL 521158 (6th Cir. 1995); *Sargi v. Kent City Board of Education*, 70 F.3d 907 (6th Cir. 1995) (School district's knowledge of a child's medical condition did not create a special relationship between decedent and school district. Sixth Circuit held that a special relationship can only occur when the state restrains an individual. *Id.* at 911).

Finally, according to Plaintiff, "[n]otwithstanding his recognition of a medical emergency, Sanders, according to his Motion, left it up to Mr. Lucas to decide whether an ambulance was necessary." (Plaintiff's Response to Motion to Dismiss at

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(Cont'd)

Southfield, 995 F.2d 1331 (6th Cir. 1993), addressed the issue of a police officer's liability for leaving two minor children unattended on the side of the road while they brought the adult driver to the police station. The Sixth Circuit held that at the time of the Plaintiff's arrest, no clearly established right, if a right existed at all, to personal security forbidding the police from abandoning passengers existed. *Id.* at 1339.

7). It must be noted that if Trooper Sanders had detained Ms. Lucas for the sole reason of obtaining an ambulance, the Defendant would likely have been met with a similar claim that the state intentionally interfered with decedent's right properly to obtain available medical treatment by deliberately preventing Ms. Lucas to proceed to the doctor's office. *See Baldi v. City of Philadelphia*, 609 F. Supp. 162 (E.D. Pa. 1985).

In conclusion, the Due Process Clause protects individuals against unlawful government interference with their right to life, liberty, and property. The Due Process Clause is phrased as a limitation on the State's power to act. *DeShaney*, 489 U.S. at 195, 109 S.Ct. at 1003. Except in very limited circumstances, the Due Process Clause does not impose "upon the State affirmative duties of care and protection" with respect to an individual. *Id.* at 1005-06. The Due Process Clause does not impose on the State an affirmative duty to provide care even though the State is aware of the danger unless the State limits the individuals' ability to care for himself; the State causes the danger; or renders an individual more vulnerable to the danger.

No affirmative exercise of Trooper Sanders' power rendered Ms. Lucas unable to care for herself or interfered with her freedom to act on her own behalf. Ms. Lucas had the freedom to proceed to the hospital via transportation from her husband. Ms. Lucas also had the freedom to accept Trooper Sanders' four offers to call an ambulance.

The Court sympathizes with the Lucas family over their loss. It is indeed a shame that Trooper Sanders was not kinder to Mr. Lucas when he realized the reason for Mr. Lucas' reckless driving. Mr. Lucas did not deserve such treatment. However, neither the death of Ms. Lucas or the emotional nature of this

case change the constitutional analysis of the above issue. The Court finds that no constitutional violation occurred, and as a result, the motion to dismiss by defendant Sanders in his individual capacity is **granted**.

Supervisory Liability

Plaintiff filed an amended complaint naming Paul Isaacs, the Commissioner of the Kentucky State Police, as a defendant instead of Gene Peters. As a result, all claims against Gene Peters are **dismissed**.

Plaintiff claims that Captain Kenneth Hardin, the post commander at the Kentucky State Police, and Paul Isaacs, Commissioner of the Kentucky State Police, approved, authorized, encouraged, recommended, affirmed, and/or ratified the conduct of Trooper Sanders. Supervisory officials may not be held liable under 42 U.S.C. §1983 on the basis of respondeat superior. "[O]fficials should be personally liable in damages only for their own unconstitutional behavior." *Leach v. Shelby County Sheriff*, 891 F.2d 1241, 1246 (6th Cir. 1989). *See also Monell v. Department of Social Services*, 436 U.S. 658, 691, 98 S.Ct. 2018, 2036, 56 L.Ed.2d 611 (1978).

> [A] failure of a supervisory official to supervise, control, or train the offending individual [employees] is not actionable absent a showing that the official either encouraged or in some way directly participated in it. At a minimum a plaintiff must show that the official at least implicitly authorized, approved or knowingly acquiesced in the unconstitutional conduct of the offending [employees].

Leach, 891 F.2d at 1246 (quoting *Hayes v. Jefferson County, Ky.*, 668 F.2d 869, 872 (6th Cir.), *cert. denied*, 459 U.S. 833, 103 S.Ct. 75, 74 L.Ed.2d 73 (1982)). *See also Searcy v. City of Dayton*, 38 F.3d 282, 287 (6th Cir. 1994). "With respect to supervisory officials the question is whether their own action or inaction subjected the claimant to the deprivation of federally protected rights." Martin Schwartz and John E. Kirklin, *Section 1983 Litigation: Claims, Defenses, and Fees* §711 (2d ed. 1991).

It follows that because Trooper Sanders did not violate decedent's constitutional rights, Captain Hardin or Commissioner Isaacs cannot be held liable for encouraging conduct that is not actionable under §1983. Therefore, the claims against Captain Hardin and Commissioner Isaacs in their individual capacity are dismissed.

Qualified Immunity — Clearly Established Law

Even if the Plaintiff could show that the Trooper Sanders owed Ms. Lucas a constitutional duty to provide medical care because a special relationship existed, the doctrine of qualified immunity would shield the individual Defendants here. In determining whether a particularized constitutional right is clearly established, the "plaintiff must do more than show that a generalized, abstract constitutional right exists." *Tucker v. Callahan*, 867 F.2d 909, 913 (6th Cir. 1989). "[T]he right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant sense. The contours of the right must be sufficiently clear that a reasonable officer would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. at 640, 107 S.Ct. at 3039, 97 L.Ed.2d at 531.

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The district court "must find binding precedent by the Supreme Court, its court of appeals or itself. In an extraordinary case, it may be possible for the decisions of other courts to clearly establish a principle of law. For the decisions of other courts to provide such 'clearly established law,' these decisions must point unmistakably to the unconstitutionality of the conduct complained of and be so clearly foreshadowed by applicable direct authority as to leave no doubt in the mind of a reasonable officer that his conduct, if challenged on constitutional grounds, would be found wanting." *Walton v. City of Southfield*, 995 F.2d at 1336. Thus, "[a] constitutional right is 'clearly established' if the law is 'clear in regard to the officials' particular actions in the particular situation.' " *Chipman v. City of Florence*, 866 F. Supp. 332, 334 (E.D. Ky. 1194)[6] (quoting *Black v. Parke*, 4 F.3d 442, 444 (6th Cir. 1993)).

The Court has been able to locate only two cases that discuss a similar situation. In *Krisko v. Oswald*, 655 F. Supp. 147 (E.D. Pa. 1987), a passenger in an automobile which was stopped for going through a red light brought a §1983 action against police officer who detained her after being informed she was being taken to the hospital. The officer refused to let the car or any of the occupants leave and continue to the hospital. The court held that "[e]ven if we agree that it was reasonable as a matter of law to summon an ambulance rather than transport or accompany her to the hospital, there are material issues of fact with respect

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6. In *Chipman*, the administrator of a passenger's estate brought a §1983 action against police officers and sheriff's deputies who allowed the passenger to leave the scene in a truck despite evidence of the driver's intoxication. The Court held that qualified immunity shielded the law enforcement officers finding that the law was unsettled on the issue of whether the Plaintiff's decedent had a clearly established right to be protected by the police under the circumstances.

to how much time elapsed between the stop and the call for an ambulance. Whether the time involved was reasonable under the circumstances, amounted to 'punishment' or was otherwise an infringement of [plaintiff's] Fourteenth Amendment liberty interest in that she was denied timely medical care, are questions inappropriate for resolution on a motion for summary judgment." *Id.* at 151. Unlike the plaintiff in *Krisko*, Ms. Lucas was not detained to await an ambulance, instead Ms. Lucas was given the choice to summon an ambulance or proceed to the hospital through transportation provided by her husband.

In *Baldi v. City of Philadelphia*, 609 F. Supp. 162 (E.D. Pa. 1985), a widow filed a civil rights action against the city and police officer arising out of the death of her husband after the car in which he was a passenger had been detained for running a red light while the driver was transporting the husband to the hospital for emergency medical treatment. The plaintiff asserted that the defendant police officer failed to provide an emergency escort or transportation and detained Mr. Baldi and prevented him from obtaining necessary medical care. *Id.* at 165. The question before the Court was whether a twenty minute police detention of the driver of a motor vehicle, stopped for a minor traffic violation while transporting Plaintiff's decedent to the hospital, creates a cause of action on behalf of the decedent under §1983 as a deprivation of life and liberty without due process of law.

The Court found that if the plaintiff could "establish that the state exercised such a degree of control over the decedent that the positive duty to provide care and transportation attached, she may be able to recover for the state's failure to act." *Id.* at 167. According to the Court, the plaintiff may also be able to establish that the state intentionally interfered with the

decedent's right promptly to obtain available medical treatment when he needed it by deliberately preventing him from proceeding to the hospital. *Id.*

As noted by the Court in *Baldi*, "when the failure or refusal to provide medical treatment is found to be a deprivation of constitutional rights, it necessarily stems from the state's control over the person (i.e., a prisoner or person otherwise confined in public custody). The state's control over an individual's freedom of movement is fundamental to its obligation to provide medical treatment, the intentional failure or refusal of which can be a deprivation of life or liberty without due process of law." *Baldi*, 609 F. Supp. at 166. The Court in *Baldi* noted that the case involved novel issues that clearly stretch to the 'outer bounds' of §1983. The court did not address the issue of qualified immunity. *Id.* at 165.

After reviewing *Baldi*, as well as the other cases discussed in the previous sections, the Court finds that the contours of the right, if a right exists at all, is not sufficiently clear that a reasonable officer in Trooper Sanders' position would understand what he is doing violated that right. Plaintiff must show that a reasonable police officer, standing in Trooper Sanders' shoes, would know, based upon decisions of the United State Supreme Court, the Sixth Circuit or this Court, that a "special relationship" had arisen between himself and Ms. Lucas under the facts Plaintiff cites establishing a duty to provide medical care or transportation to the doctor's office. Plaintiff has failed to cite any cases that would convince the Court that such a duty existed.[7]

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7. *See also Wilson v. Meeks*, 52 F.3d 1547 (10th Cir. 1995) (Tenth Circuit held that Police officer owed no duty to render medical aid to suspect who was injured by police officer after medical assistance was summoned. *Id.* at 1555-56.); *Harris v. District of Columbia*, 932 F.2d 10

(Cont'd)

Thus, Defendants would be entitled to qualified immunity on this basis as well.

Fourth Amendment Claim

Plaintiff asserts that Trooper Sanders, Captain Hardin, and Commissioner Isaacs deprived Judith Lucas of her rights secured by the Fourth Amendment. The Fourth Amendment protects the rights of an individual to be free from an unreasonable search and seizure and to be free from the use of excessive force from a state actor. The Court can find no set of facts alleged that would support such a finding of a violation of Lucas' Fourth Amendment rights.

Official Capacity

Plaintiff has sued the Defendants in their official capacity. "[A] suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office." *Will v. Michigan Department of State Police*, 491 U.S. 58, 71, 109 S.Ct. 2304, 2312, 105 L.Ed.2d 45 (1989). "[N]either a State nor its officials acting in their official capacities are 'persons' under §1983" *Id.* at 2312, 491 U.S. at 71. Thus, the claims against the Defendants in their official capacity are dismissed.

(Cont'd)

(D.C. Cir. 1991) (No clearly established Constitutional obligation to obtain medical care for a victim of a drug overdose who died in custody of police. District of Columbia Circuit held that the victim had not been formally committed, either by conviction, involuntary commitment or arrest to the charge of the District. *Id.* at 15.

Appendix B

Pendent State Law Claims

Dismissal of the federal court claims removes the underlying basis for the Court's jurisdiction. The court shall dismiss the pendent state law claims without prejudice so they may be brought in the appropriate state court. *United Mine Workers v. Gibbs*, 383 U.S. 715, 726, 86 S.Ct. 1130, 1139, 16 L.Ed.2d 218 (1966).

The Court being sufficiently advised,

IT IS HEREBY ORDERED that Defendants' Motion to Dismiss [DN 2] is **granted**; and

IT IS FURTHER ORDERED that the pendent state law claims are dismissed without prejudice to be brought in the appropriate state court.

THIS IS FINAL AND APPEALABLE. THERE IS NO JUST CAUSE FOR DELAY.

This the 5th day of August, 1996.

s/ Joseph H. McKinley, Jr.
Joseph H. McKinley Jr.
Judge, United States District Court

cc: Counsel of Record

Supreme Court, U.S.
FILED
DEC 12 1997
CLERK

(2)

No. 97-808

In The

Supreme Court of the United States

October Term, 1997

PATRICIA FULTON, Personal Representative of the Estate of JUDITH LUCAS, and GROVER LUCAS,

Petitioners,

vs.

RICKY SANDERS, KENNETH HARDIN and PAUL ISAACS,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

LOUIS F. MATHIAS, JR.
Counsel of Record
KENTUCKY STATE POLICE
919 Versailles Road
Frankfort, Kentucky 40601
(502) 695-6318

Attorney for Respondents

72631
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21
Lutz Appellate Services, inc.

8 pp

PARTIES TO THE PROCEEDING

The petition accurately lists the parties to the proceedings.

STATEMENT OF THE CASE

The petition in this case seeks review of a Sixth Circuit Court of Appeals order affirming the district courts dismissal of a civil rights action premised on the Fourth and Fourteenth Amendments of the United States Constitution.

As set forth below, there is no cause for this Court's review. The detailed opinion of the District Court (Appendix B of Petition), follows the precedents of this Court, provides no basis of conflict with other circuits, and establishes no basis in fact for an extension or further interpretation of existing law.

A. The petition misrepresents the underlying facts of the case before the District Court, and in turn flaws the questions presented for review.

On June 21, 1995 at approximately 3:55 p.m., Kentucky State Police Trooper Ricky Sanders was checking traffic on old 31 W, north of Bowling Green, Kentucky in response to complaints of speeding and reckless operation on the two lane roadway.

Trooper Sanders had just issued a citation to a motorist he had stopped when Plaintiff Grover Lucas drove by at a high rate of speed. Trooper Sanders pursued the Lucas vehicle for 5.1 miles and stopped the vehicle at 3:59 p.m. During the five (5) mile pursuit the Lucas vehicle almost hit several vehicles and a motorcycle head-on while driving at a high rate of speed. Mr. Lucas got out of his vehicle after being stopped and informed Trooper Sanders that he was enroute to his wife's physicians office. Trooper Sanders did not know the Lucas', and had no basis to know if what he was being told as an excuse for the reckless operation was true or false. After chastising Mr. Lucas for his reckless operation, and without issuing any citations, Trooper Sanders released Mr. Lucas at 4:02 p.m., and followed the vehicle the remaining 5.2 miles to the physicians office to ensure safe arrival. Trooper Sanders had only a brief conversation with Plaintiffs' decedent when she informed him she was not feeling well, he check her pulse, and offered to summon an ambulance six (6) times. On some subsequent date

Trooper Sanders learned that Plaintiffs' decedent Judith Carole Lucas expired the following day, June 22, 1996 at 2:02 p.m..

On January 16, 1995 Plaintiffs filed action 1:96-CV-7-M in United States District Court for the Western District of Kentucky at Bowling Green. On August 9, 1996 an amended complaint was filed, removing Retired Commissioner Gene Peters as a defendant, and including Retired Commissioner Paul Isaacs as a defendant. Commissioner Isaacs was never served. On August 9, 1996 Memorandum Opinion and Order was entered dismissing the complaint. On August 13, 1997 order of the Sixth Circuit Court of Appeals issued affirming the opinion of the district court. Petitioners have since filed a civil action premised on the same operative facts in the Warren County, Kentucky circuit court.

Petitioners characterization of Trooper Ricky Sanders as some form a demon beginning at page 3 of the petition is totally without merit. As petitioners are well aware Trooper Sanders is a well respected member of the community and a dedicated officer. The remarks to the contrary are considered as intemperate and unprofessional and should be stricken.

A proper formulation of the issues must under these facts relate to the traffic stop, and any duties or responsibilities following from that stop.

REASONS FOR DENYING THE WRIT

The petitioner's claim, and properly formulated issues, support the decision below, and on review no conflict among the circuits is present which would support the granting of this writ.

1. In *Whren v. United States*, 116 S. Ct. 769 (1996), this Court addressed the reasonableness of traffic stops. In general traffic stops standing alone are not considered custodial in nature. The Court held that a traffic stop is reasonable, and there is no violation of the Fourth Amendment, if an officer has probable cause to believe that a traffic violation has occurred. In the petition it is admitted that Mr. Lucas was traveling at a high rate of speed, and there is no question that the stop here in question was reasonable.

2. In *Maryland v. Wilson*, 117 S. Ct. 882 (1997), this Court again addressed traffic stops, the issue primarily relating to the rights of passengers in the stopped vehicle. While noting that traffic stops may be dangerous to an officer, this Court held that during a traffic stop an officer may order passengers from the vehicle as well as the driver. In his dissent, Justice Kennedy noted that even routine traffic stops can take upwards of 30 minutes, and that a seizure of the passenger does not occur until the passenger is ordered from the vehicle. *Id.* at 890. In this case Trooper Sanders stop lasted less than 4 minutes, he allowed petitioners to leave without a citation, and ordered them to obey the law, which all citizens are required to do. The passenger was not ordered from the vehicle, and accordingly there was no seizure of Judith Lucas on which a duty may be imposed or a special relationship created.

3. In *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 109 S. Ct. 988, 103 L. Ed. 2d 249 (1988), this Court set forth the guidelines relating to a states duty to protect its citizens. The parameters provided were:

> . . . when a state takes a person into custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and well-being . . .

Id. at 199-200. The word custody has since been refined to mean some form of forced detention beyond that of a normal traffic stop. This language implies at the least that some form of illegal detention, application of force or custody must exist before any duty arises. In this case the less than 4 minute legal traffic stop involved no custody, created no special relationship nor any corresponding duty. Trooper Sanders did not create the severe heart condition which Mrs. Lucas suffered from for many years nor did he in the short traffic stop make it worse. He assessed the situation, determined that speeding with or without an escort would increase the danger, save little time in going to the nearby physicians office, and the best procedure to follow was to summon an ambulance, equipped with paramedics and equipment to treat a person with a heart condition. Trooper Sanders offered to summon an ambulance

on 6 occasions. The petitioners had a constitutional right to refuse Trooper Sanders offer of summoning an ambulance, and did so. *Washington v. Glucksberg*, 117 S. Ct. 2258 (1997). This Court has noted its reluctance to expand the concept of substantive due process, *Id.* at 2268, and on the facts of this case should make no expansion now. No present duty existed in this traffic stop situation, Trooper Sanders did not violate any policy as petitioners contend, and to impose a duty of providing medical care in traffic stop situations would impose impossible chaotic conditions with "no guideposts for responsible decisionmaking". *Id.* at 2268. Trooper Sanders conduct came no where close to the shock the conscience standard set forth in *Rochin v. California*, 342 U.S. 165, 72 S. Ct. 205, 96 L. Ed. 183 (1952), and at best could be perceived as some form of state tort.

4. In the detailed decision below the court took patience to methodically walk through the complaint. Cases of the Sixth Circuit, this Court, and other circuits were reviewed. One case involving a traffic stop, *Baldi v. City of Philadelphia*, 609 F. Supp. 162 (E.D. Pa. 1985) was cited by petitioner below. In *Baldi* an officer made a traffic stop, and then forced the citizen to wait 20 minutes for an ambulance, and the court there opined that this forced detention beyond the traffic stop may create some duty. In reviewing all cases the court below found no clearly established constitutional right requiring Trooper Sanders to do more than what he did in the routine traffic stop situation. All cases cited by petitioner, and those cited below, contain one element not present herein. The element is either custody or forcing the citizen to do something against their will not otherwise authorized by law. The petitioner seems to contend that the Sixth Circuit has changed their position since deciding this case by a citation to *Stemler v. City of Florence*, 28 SCR 20, October 28, 1997, p 6 (6th Circuit Slip Opinion Nos. 96-5593 and 96-5966). Contrary to petitioners contention the Stemler opinion supports the decision below. In *Stemler* the citizen was forced to get into a vehicle, actually physically placed in a vehicle, she did not wish to be in, and the court viewed that as a custody situation. The Sixth Circuit held that this added force (custody) beyond a normal traffic stop imposed a duty on the officers. The court also noted that they

did not opine as to the circumstances under which a substantive due process claim in a non-custodial setting might be possible.

5. In addressing the legal question of qualified immunity the court below followed the direction set forth by this Court in *Anderson v. Creighton*, 483 U.S. 640, 107 S. Ct. 3039, 97 L. Ed. 2d 531. Finding no clearly established right the court below granted immunity to all officers in their individual capacity. The official capacity claims, which arguably the entire claim was, were dismissed as mandated by *Will v. Michigan Department of State Police*, 491 U.S. 58, 109 S. Ct. 2304, 105 L. Ed. 2d 45 (1989). The pendant state tort claims were also dismissed, and are being pursued by petitioners in state court.

6. This is an emotional case, which by their very nature make bad law. It is indeed sad when any human being passes from this earth. The facts of this case do not support the use of 42 U.S.C. § 1983, and standing alone that statute creates no rights. This case does not involve reliance on an offer of assistance such as in *G-69 v. Degman*, 745 F. Supp. 254 (D.N.J. 1990); it is not a case where the officer cut off a source of rescue, *Estate of Sinthasomphone v. City of Milwaukee*, 785 F. Supp. 1343 (E.D. Wis. 1992); it is not a case where anyone was restrained from rescuing, *Horton v. Flemory*, 889 F.2d 454 (2d Cir. 1989); nor is it a case where anyone conspired or condoned any injury resulting from violence. *Freeman v. Ferguson*, 911 F.2d 52 (8th Cir. 1990). This case is a traffic stop case, without custody or constructive custody, where the citizen refused the assistance offered, and absent any of the foregoing there is no basis for a claim and this writ should be denied.

CONCLUSION

For the reasons given above, the petition should be denied.

Respectfully submitted,

LOUIS F. MATHIAS, JR.
Counsel of Record
KENTUCKY STATE POLICE
919 Versailles Road
Frankfort, Kentucky 40601
(502) 695-6318

Attorney for Respondents